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MEMORANDUM TO MUNICIPAL CLIENTS

To: BOARD OF SELECTMEN/MAYOR/TOWN AND CITY COUNCIL
TOWN MANAGER/TOWN ADMINISTRATOR/EXECUTIVE SECRETARY

Re: Open Meeting Law – Determinations of the Division of Open Government

This is the third in a series of four memoranda to clients concerning the application of the revised Open Meeting Law, G.L. c.30A, §§18-25. The new version of the Open Meeting Law took effect on July 1, 2010. Since that time, the Attorney General, as the enforcing authority under the law, has issued a number of decisions through its Division of Open Government (the "Division"). In addition to the text of the law and the regulations promulgated by the Attorney General, these decisions establish the standards to which all public bodies are now subject. These standards are, in many respects, a significant change from the manner in which the Open Meeting Law was interpreted in the past, and public bodies will need to re-examine their open meeting procedures to ensure compliance.

The last memorandum in this series will present an Open Meeting Law notice "checklist" and draft meeting notice agenda items and votes to be used in preparing for and conducting public meetings.

Posting

Under the revised Open Meeting Law, the chairman of a public body must post notice of a meeting, including all topics the chair reasonably anticipates will be discussed, no later than 48 hours prior to the meeting, excluding Saturdays, Sundays and legal holidays. The posting must be made in all locations required by law, or the Attorney General will conclude that the meeting was not properly posted. See AG-OML-2011-32. Thus, for example, if the municipality posts meeting notices in the Town Clerk's office and on the Town's website, the posting must be made timely in both locations in order for the public body to hold its meeting as planned.

Updating Meeting Notices

As noted, the posting is required to include those matters that the chair reasonably anticipates will be discussed at the upcoming meeting. If something else comes to the attention of the chair after the posting deadline but before the meeting, and that matter was not something the chair should have reasonably anticipated, the Attorney General

has indicated that the chair is required to update the meeting notice with the additional item or items as soon as possible, to the extent feasible. See AG-OML-2011-53. For example, if the Town Manager, the morning after the deadline for posting has passed, informs the Council President of a just-issued decision in a court case that requires the Council to take immediate action, the Council President should update the meeting notice as soon as possible to include that matter.

Discussion of Matter Not Appearing on Meeting Notice

The Attorney General has taken the position that a public body cannot discuss a matter that should have been reasonably anticipated unless that matter appears on a meeting notice. Thus, if a matter is raised by a single selectman or councilor, or if a citizen raises a matter during a citizen participation period, the public body may discuss, and even act, on the matter at issue provided that the chair should not reasonably have anticipated the matter would be discussed at the meeting.

Be aware, however, that the Attorney General takes the position that although the law does not prohibit such action, it should be avoided. In AG-OML-2011-32, the Attorney General explains this position in detail:

> [W]e caution public bodies to carefully consider whether a topic not listed in the meeting notice—particularly one that is controversial in nature—is appropriate for lengthy deliberation and decision by the public body at the time it is raised. . . Nevertheless, we realize that topics may be raised during meetings, either by members of the public or by members of the public body, which were not anticipated. Accordingly, public bodies are advised that discussions on topics that are not listed in the meeting notice should be avoided when possible and, if they must occur, should be general and brief. Here, a discussion of the topic raised by the Police Chief would have more appropriately been conducted during an adequately noticed meeting. This is particularly true given the nature of the deliberation . . . Although we are constrained to find that the Board acted within the letter of the Open Meeting Law because the topic was not anticipated in advance of the meeting, the Board failed to act within the spirit of the Open Meeting Law. The intent of the Open Meeting Law would have been better served if the discussion had been postponed until a future, duly posted meeting. [Emphasis added].

Be reminded that although the Attorney General can "encourage" public bodies to put off matters not reasonably anticipated, such action is not required by the Open Meeting Law. Whether it makes sense in any particular case to consider a matter not reasonably anticipated by the chair is a policy decision. However, a public body may want to keep in mind that if an objection is raised with respect to consideration of the matter at that meeting, it is always possible that a complaint will be filed with the Division. Based

upon the above decision, the Attorney General's response to such a complaint can be anticipated.

Use of Exemption 7

Exemption 7 to the Open Meeting Law allows a public body to go into executive session to comply with a general or special law or a federal grant-in-aid requirement. Under the prior version of the law, it was generally unclear whether and when a public body might be permitted to use the exemption. The Attorney General has specifically recognized, however, that the exemption can be used to protect an individual's privacy under G.L. c.214, §1B or the Public Records Law. See AG-OML-2011-53. Importantly, if a public body goes into executive session under this exemption, the body must specify the law on which it is relying.

Deliberations - E-mail Opinions Prohibited

The revised Open Meeting Law specifically defines the term "deliberation" to include e-mail. However, the law exempts from the definition the distribution of a meeting agenda, scheduling information, or distribution of documents that might be discussed at a meeting "provided that no opinion of a member is expressed". The Division, in AG-OML-2011-14, reviews the application of this definition, and finds that an e-mail sent to a quorum of members requesting a meeting violated the law where it included the following statement, "when we took the language about the opportunity for a public hearing out of the bylaw, it rendered it no longer compatible with the procedure language we approved. I think we need to meet to resolve this issue." The Attorney General determined that this portion of the e-mail constituted an "opinion" in violation of the law. When requesting agenda items, therefore, care must be taken to ensure that the reasons for requesting the inclusion of the agenda item not be shared via e-mail among a quorum of members of a public body. Be reminded that an e-mail made or received by a governmental officer or employee is a public record subject to mandatory disclosure upon request, subject to the application of any exemptions to the law.

Deliberations – Matters that Require a Posted Meeting

In AG-OML-2011-38, the Attorney General concludes that although scheduling and distribution of various materials may be accomplished by e-mail, other types of "procedural or administrative matters" cannot. The Attorney General indicates that the following matters constitute "deliberations" and must appear on a properly posted meeting notice to be discussed by the members of a public body: organization and leadership of the public body; committee assignments; rules or bylaws for the body; and discussions of whether the body should consider or take action on specific topics at a future meeting. It is likely the last item in this list that will pose the greatest challenge, as

members of a public body requesting inclusion of an agenda item will need to be careful not to "explain" their reasoning for requesting such an agenda item in an e-mail to a quorum of members of the public body, as discussed above. For five-member boards, this risk may be minimized by copying only the chair or administrative staff when requesting agenda items.

Intentional Violations

In virtually all cases in which the Attorney General finds a violation of the law, the decision indicates that "future similar violations may be considered an intentional violation." See, e.g. AG-OML-2011-48; AG-OML-2011-45; AG-OML-2011-38. This is significant, as the revised version of the Open Meeting Law allows for imposing a civil penalty of $1,000 against a public body for each intentional violation.

Cure/Remedial Action

Consistent with prior case law, the Division recognizes that "public deliberation (at a properly posted open meeting) effectively cured the private discussion which occurred over email because it enabled the public to see the discussion that went into the creation of the policy. To cure a violation of the Open Meeting Law, a public body must make an independent deliberative action, and not merely a ceremonial acceptance or perfunctory ratification of a secret decision." AG-OML-2011-14. It is imperative, therefore, if a public body is attempting to cure an earlier violation, that there be deliberation about the issue. The chair can encourage board members to participate by inviting their comments. Additionally, care should be taken to attach to the minutes of the current meeting the minutes of any earlier meeting held in violation of the law or any e-mail or other records that may have contributed to a violation.

In summary, the new Open Meeting Law imposes additional obligations on public bodies and members thereof. The Attorney General's interpretation of the law continues to be explained on a case by case basis through the issuance of decisions on Open Meeting Law complaints filed with the Attorney General. While many of these decisions represent a significant change from the obligations imposed by the prior version of the law and may therefore involve revision of existing practices and procedures, compliance with the newly explained standards will be helpful in protecting public bodies from complaints.

Very truly yours,

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